FILED
APR 12 19
HAROLD B. WILLEY

No. 716

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

HARRY H. WINER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER

ROBERT N. GORMAN,
HARRY KASFIR,
Counsel for Petitioner.

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut St., Cincinnati, O.

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Argument	3
First Question	3
Second Question	7
Conclusion	10

CITATIONS

Batsell v. United States, 217 F. (2d) 257	8
Beckett v. United States, 84 F. (2d) 731	7
Berwind-White Coal Mining Co. v. Chicago Erie R. R. Co., 235 U. S. 371	5
Camp v. United States, 297 F. 452	9
Chapman v. United States, 151 F. (2d) 740	5
Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177	5
Cwach v. United States, 212 F. (2d) 520	8, 9
Danciger v. Cooley, 248 U. S. 319	6
Heyman v. Hays, 236 U. S. 178	3
Kleindienst v. United States, 48 App. Div. 190 (Dist. Col. C.A.)	2, 8, 9
Lehigh Valley Railroad Co. v. Barlow, 244 U. S. 183	5
Lett v. United States, 15 F. (2d) 670	2, 9
Marifion v. United States, 82 F. (2d) 628	6
Murphy v. United States, 133 F. (2d) 622	6
Nick v. United States, 122 F. (2d) 660	3
Terminiello v. Chicago, 337 U. S. 1	8
United States v. Schwartz, 150 F. 627	6
Wilkes v. United States, 291 F. 988	8

Rule 24, Rules of Federal Criminal Procedure 7

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 716

HARRY H. WINER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

There are two important questions, which the Government attempts to evade rather than answer. Involved in this case was a shipment by a railroad to itself, which had actually reached its destination. When it did, the interstate journey had ended.

The Government wants to make the test of whether the interstate journey had ended depend on whether the seals were broken or intact. The Government contends that so long as the seals were not broken the goods were still in interstate commerce. This would be a fictitious test, because if the seals were broken either accidentally

or deliberately the goods would not be in interstate commerce, but if the seals remained on the cars even four months after reaching their destination they would still be in interstate commerce. The Government's reliance on the seals overlooks the fact that a private shipper is not involved. In such case delivery may be the test of the end of the interstate journey. Even if the seals are broken the interstate journey is not ended when there is no delivery to the private consignee. Where as here the railroad is both shipper and consignee it has possession during the interstate journey and after it has ended. The factor of possession as evidenced by the seal is not a determining one.

However, the Government relies even more strongly on self-serving statements of railroad officials. The official records show that one of the cars was marked in the railroad books as "Received 2-4-54" (R. 30a), but the Government contends that did not mean it had reached its destination because the general foreman "testified that the shipment was not regarded as received by the company until the car was opened and the materials checked out and placed in the company warehouse." (Brief of United States, p. 5) The question of arrival would not be dependent on either the facts or the law if this contention is upheld, but solely upon self-serving declarations and explanations of railroad officials. To attempt to evade the official receipt of goods by saying this only showed an arrival of the goods in the yard is to permit the railroad officials to override both the facts and the law.

On the question of the impartiality of the jurors the Government does not deny that there is a conflict between the decision in this case, and that of *Lett* v. *United States* 15 F. (2nd) 670 (CCA 8) and *Kleindienst* v. *United States*, 48 App. 190 (Dist. Col. C.A.) To permit jurors who had found a co-defendant guilty, to serve in petitioner's

cause was prejudicial error, particularly when the facts pertaining to whether the shipments were in interstate commerce were identical, arose out of the same transaction, and that question was decided by the jury in both instances.

The court in this case left the question of whether the goods were in interstate commerce to the jury. We take it that

> "It is not for the jury to determine what is or what is not interstate commerce – that is a question of law. It is for the court to charge that if certain facts covered by the evidence are shown that there is such interference." *Nick* v. *United States,* 122 F (2d) 660 (CCA 8).

In this case where the facts were undisputed it was clearly a question of law, and as Judge Miller found in his dissenting opinion "that at the time of the theft the cars had arrived at their destination and had been delivered to and accepted by the consignee" 228 F (2d) 944, (CA 6).

It was error to leave the question of whether the goods were in interstate commerce to the jury, and it was heaping error upon error to leave such a question to a jury which contained members, who had already passed on that question in the case of a co-defendant jointly indicted with petitioner.

ARGUMENT

I

There are certain matters that should be clear. Commerce begins when the movement of a product is actually begun and ends when such product arrives at its destination. "Substance and not form controls in determining whether a particular transaction is one of interstate commerce." *Heyman* v. *Hays,* 236 U. S. 178, 187.

Whether the cars are sealed or not, which is a matter of form, is not controlling. When goods reach their destination the journey has ended, and the undisputed evidence is that they had reached their destination in this case.

(a) The only notation on the records made and kept by the storekeeper, who was also the consignee, was the date of receipt. The statement that this was a "record of cars in the yard" is a verbal addition made at time of trial. It involves the mental processes of the foreman but there is nothing on the original record to that effect. Instead the district storekeeper testified "These are our records, official records, received shipment" (App. 30a). Why would the consignee, the district storekeeper, and his general foreman whose concern was with "materials and supplies" (App. 29a) make any record unless he was indicating receipt of the material and supplies which made up the shipment. The records were identified by the recipient as "an inventory" (App. 30a). A record of "cars in the yard" — a yard which was "included" in the area of the storekeeper (App. 32a) is a record of the materials and supplies in the cars. This is particularly so when the storekeeper had no room for storage in the warehouse when the cars arrived (App. 56a) and the cars were used as supplementary warehouse facilities.

(b) The mere fact that the storekeeper-consignee and his foreman "regarded" that the shipment was not received is not evidence. The decision as to whether the case should have been taken from the jury had to be decided from the facts and the legal question was not converted into a jury question because the writer of the official entry sought in a verbal statement at time of trial to limit what he had written. The consignee was only concerned with "materials and supplies" (App. 29a) not with "cars" and his entry "Received 2-4-54" contained no limitation.

(c) The mere fact the cars were "under the original seals" does not mean that the goods were not received by the consignee. The "seal" does not prove whether an interstate journey exists. It proves only continued possession by the carrier. Such continued possession, may indicate that an interstate journey has not ended where the goods are to be delivered to a private consignee. Here, however both the carrier and the consignee were one and the same. Possession is no test of the end of the interstate journey since the goods would remain in the railroad's possession even after the interstate journey ended. Shipments belonging to a carrier and shipped to itself lose their interstate character when placed on a siding track even though it is necessary later to move those cars to another point in the same yard at a place convenient for unloading. Continued possession, by the railroad, in such case is not the test of termination of the interstate journey.

Lehigh Valley Railroad Company v. *Barlow*, 244 U. S. 183
Chicago, Burlington & Quincy R. R. Co. v. *Harrington*, 241 U. S. 177

(d) No question of fact was presented. The case was to be judged only by record facts and those were that the consignee had noted receipt in official records before the theft. If the goods had been placed in the warehouse the "receipt" could not be qualified by a later oral statement that they were not considered received for some reason or other.

(e) Under the cases the shipment did lose its interstate character. *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183. *Berwind-White Coal Mining Co.* v. *Chicago Erie R. R. Co.*, 235 U. S. 371. The cases cited by the Government are not in point. In *Chapman* v. *United States*, 151 F. (2d) 740 the goods were to be delivered to a private consignee. Part of the goods were delivered. The re-

maining portion remained in the carrier's possession and as evidence of such possession a seal was applied. The theft was from the undelivered portion and it was held it was from an interstate shipment.

In *United States* v. *Schwartz,* 150 F. 627 the goods were stolen while they were moving from New Jersey to New York. Actually the truck was taken while on the "Hoboken-West 23rd Street Ferry" in the course of this interstate journey between the two states.

In *Murphy* v. *United States,* 133 F. (2d) 622 the goods were shipped from North Carolina to Tennessee. Appellant argued that the interstate journey ended because the goods were stolen after they were placed in the railroad warehouse. However they were not delivered to the consignee. Appellant argued that there was such delivery upon his mistaken assumption (see footnote 133 F. (2d) 626) that the consignee paid the freight (133 F. (2d) 625). Delivery and not payment of freight however was held to be the test. In *Marifion* v. *U. S.,* 82 F. (2d) 628 the theft was from a "truck in the course of the trip from East St. Louis, Illinois to St. Louis, Missouri" (82 F. (2d) 630). *Danciger* v. *Cooley,* 248 U. S. 319 is concerned with termination of interstate shipment when delivered to the consignee. The carrier was not the consignee.

Thus all the cases cited by the Government do not touch the point involved. Namely that the interstate shipment here ended when the carrier shipping to itself noted receipt of the goods in its official records. The Government conceded that one car remained on track 22 until "June 1, 1954" (Respondent's Brief, p. 5). This was five months after it arrived. Under the Government's argument interstate commerce continued during that five month period and could have been extended by the railroad indefinitely merely by keeping the car on the storage or supplementary warehouse track.

II

As we said before no attempt is made by the Government to distinguish or deny that there is a conflict between this case and the rulings in *Lett* v. *United States*, 15 F. (2d) 690 (CCA 8) and *Kleindienst* v. *United States*, 48 App. Div. (DC) 190.

In every case cited by respondent the transaction was different in the second trial than that involved in the first trial. In this case a co-defendant, Siskin, had been convicted of having received stolen goods taken from the same railroad cars at the same time that the goods allegedly sold to petitioner were stolen. The jury in Siskin's case had held the goods were in interstate commerce when stolen. How could they be said to be unprejudiced on that point when they are called to pass judgment on petitioner? The factor of the identical transaction is totally disregarded in the brief of the Government.

The defendant in this case had ten peremptory challenges. *Beckett* v. *United States*, 84 F. (2d) 731 (CCA 6). *Rule 24(b), Rules of Federal Criminal Procedure.* Both the court and the Government were wrong in assuming there were twenty challenges because there were two indictments (App. 145a, Respondent Brief, p. 6, footnote 1), and the clerk was right in stating to counsel there were only ten challenges. The record shows the ten challenges were exhausted. (App. 12a, 13a)

It is argued that Juror Mercer was accepted when petitioner still had two unused peremptory challenges, and that petitioner knew Mercer had served on the Siskin jury. At that time the court had already ruled that jurors in the Siskin case were competent (App. 11a), and the only jurors available for service were those from the Siskin jury. It would have been ridiculous to challenge Mercer for cause only to have another of the *Siskin* jurors called. It is clear,

however, that when Mercer was finally accepted and the jury sworn that Mercer and two others who served on the panel in Siskin's case were on the jury to try petitioner. So the issue of a fair trial by an impartial jury was before the trial court, appellate court and this court. Cf. *Terminiello* v. *Chicago*, 337 U. S. 1.

Respondent attempts to contend that petitioner failed to show partiality because the jurors remained silent when asked if any of them had prejudged petitioner, and because the court noted that the jurors were questioned about trying the case fairly on its own facts. (Brief of Respondent, p. 9). Actually only one of the jurors was questioned by the court on this point. The others were not. (App. 11a, 13a). Their silence or any statement of fairness would hardly blot out the fact that three of them on the same evidence had found goods in the same shipment were in interstate commerce. Such answers were "inconsistent with human experience." Cf. *Kleindienst* v. *United States*, 48 App. Div. 190 (CAD. C)

None of the cases cited by respondent are applicable. In *Cwach* v. *United States*, 212 F. (2d) 520, 529 (CA 8) only six of the ten peremptory challenges were used. In *Batsell* v. *United States*, 217 F. (2d) 257, 260 no jurors sat in both cases as here, although the jurors were selected from the same panel. In *Wilkes* v. *United States*, 291 Fed. 988 there was an independent offense of a similar nature. None of those cases involved a joint indictment of the defendant and the party found guilty on the previous trial. Here such a situation existed and severance was granted to avoid prejudice but that ruling was rendered ineffective by allowing the same jurors to sit in both cases.

Here we have three jurors who found a co-defendant, who was jointly indicted, guilty, being permitted to pass judgment on the defendant. Not only did the three boys testify to the theft in both cases, but their testi-

mony was that the goods were stolen in the same manner and at the same time. Could the three jurors possibly say that the goods stolen in the Siskin case were in interstate commerce, but the goods stolen from the same cars at the same time in petitioner's case were not in interstate commerce.

In all the cases cited by respondent, the same transaction was not involved in both cases while this case is based on the same principles which caused reversals in the *Lett* and *Kleindienst* cases. Cf. 160 ALR 753.

The *Cwach* case was decided by the United States Court of Appeals for the Eighth Circuit. That court appreciated the distinction now made. In *Camp* v. *United States*, 297 F. 452 the Eighth Circuit Court of Appeals faced with a situation similar to the *Cwach* case was careful to note that the juror was qualified because the violation involved was based on a separate and distinct transaction. Here a single transaction — a single set of facts determined whether the goods which were stolen were part of interstate commerce. Having determined that the goods sold to Siskin were stolen from an interstate shipment, the jurors had decided the jurisdictional point since the goods allegedly sold to Winer were taken from the car at the same time. The jurors on the same facts could not be deemed impartial when the same question based on the same transaction was presented in the second case.

If the jury system is to mean anything, it must be one that demands that one tried in a criminal case shall have fair and impartial jurors. Otherwise the system is one directly contrary to every provision which the Sixth Amendment seeks to guarantee. The petitioner in this case was not convicted by an impartial jury.

CONCLUSION

On the undisputed evidence the goods in question were not in interstate commerce, and as Judge Miller in his dissent clearly shows a verdict of acquittal should have been granted.

If the cause had any aspects of a jury question, it was error to submit the matter to a jury having three members, who had already passed on the guilt of a co-defendant. This was not an impartial jury.

We submit that certiorari should be granted, and this conviction reversed on final hearing.

Respectfully submitted,

ROBERT N. GORMAN,
HARRY KASFIR,
Counsel for Petitioner.